APPEAL NO. 021137
FILED JUNE 26, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on April 16, 2002. The hearing officer decided that the respondent (claimant) did sustain a compensable injury on _____; that the claimant did have disability from the compensable injury of _____, beginning on April 17, 2001, and continuing through the date of the hearing; and that the appellant's (carrier) contest of compensability was not based on newly discovered evidence that could not reasonably have been discovered at an earlier date, thus the carrier was not allowed to reopen the issue of compensability. The carrier appealed asserting evidentiary error, and asserting that the evidence does not support the hearing officer's decision. The file does not contain a response from the claimant.

DECISION

Affirmed.

On appeal, the carrier asserts that the hearing officer committed reversible error by admitting three of the claimant's exhibits, which constituted "hearsay." We do not agree. Whether or not an exhibit constitutes "hearsay" goes to the weight to be given the evidence, not its admissibility. Nowhere in the 1989 Act is there a provision that "hearsay" evidence is not admissible. *See* Section 410.165(a). The carrier has failed to show any reversible error on the part of the hearing officer in admitting the claimant's exhibits. Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ).

The hearing officer did not err in determining that the carrier's contest of compensability was not based on newly discovered evidence that could not reasonably been discovered at an earlier date, thus the carrier was not allowed to reopen the issue of compensability. Sections 409.021(c) and (d) of the 1989 Act state, in relevant part:

> (c) If an insurance carrier does not contest the compensability of an injury on or before the 60th day after the date on which the insurance carrier is notified of the injury, the insurance carrier waives its right to contest compensability.
>
> (d) An insurance carrier may reopen the issue of the compensability of an injury if there is a finding of evidence ***that could not reasonably have been discovered earlier***. (Emphasis added).

The carrier argued that it was unable to contest the claim earlier, because the claimant had deceived his employer and treating doctors by failing to disclose his prior

injuries, and that it was unaware the claimant had five prior workers' compensation claims until it "went out and secured that information." Thus, it appears that the carrier did very little to investigate the claim until after the 60-day contest period expired when it finally obtained records from the Texas Workers' Compensation Commission (Commission) regarding the claimant's claim history, records which were readily available to the carrier within the 60-day contest period. The Appeals Panel has frequently noted the importance of the exercise of due diligence if a party is claiming newly discovered evidence; not only the exercise of due diligence in acting upon the evidence once obtained, but also in seeking the information in the first place. Generally, we have maintained that a lax investigation or none at all does not make evidence found later "newly discovered." Texas Workers' Compensation Commission Appeal No. 002246, decided November 8, 2000; Texas Workers' Compensation Commission Appeal No. 000697, decided May 22, 2000; Texas Workers' Compensation Commission Appeal No. 992365, decided December 6, 1999. We conclude that the carrier failed to establish that the evidence it relied upon to reopen the compensability of this claim was "newly discovered."

The hearing officer also did not err in deciding that the claimant had disability resulting from the compensable injury from April 17, 2001, through the date of the hearing. Conflicting evidence was presented on the issue of disability. Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Ins. Co., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The hearing officer's disability determination is not so against the great weight of the evidence as to compel its reversal on appeal. Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA** and the name and address of its registered agent for service of process is

**CT COORPORATION SYSTEM**
**350 NORTH ST. PAUL STREET**
**DALLAS, TEXAS 75201**.

_____
Daniel R. Barry
Appeals Judge

CONCUR:

_____
Philip F. O'Neill
Appeals Judge

_____
Robert W. Potts
Appeals Judge